Supreme Court, U.S.
FILED

10-267 AUG 19 2010

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No. ___

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
PATRICIA HAIGHT
and IN DEFENSE OF ANIMALS
Petitioners,

v.

CATHOLIC HEALTHCARE WEST,
MICHAEL BERENS,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 2010

QUESTION PRESENTED

In *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009), the Court retroactively shortened a jurisdictional appeal period, causing this appeal – timely under settled law when filed – to be fatally late. At 2236 n.4, it noted, but did not resolve, possible harsh consequences of the retroactive change. In *United States ex rel. Haight v. Catholic Healthcare West*, the Ninth Circuit misunderstood footnote 4 to have altered the Due Process analysis of retroactive changes in jurisdictional law. Together with its misconstruction of *Bowles v. Russell*, 551 U.S. 205 (2007), the circuit court below determined it had no option but to reach an admittedly inequitable result of dismissal, terminating petitions' litigation rights. Petitioners had very good cause for a 30 day extension in which to file their notice of appeal under Rule 4(a)(5), but the Court concluded it was powerless to grant the extension, despite the plain authorizing language to do so in Rule 26(b).

The Question Presented is:

Whether for good cause or excusable neglect circuit courts may grant a 30-day jurisdictional extension of time to file a notice of appeal as authorized in Rule 4(a)(5) [and stated in Rule 26(b)].

Granting the petition and answering the Question Presented in the affirmative would resolve persistent confusion and conflicts over equitable considerations by the circuit courts under Rules 2, 4 and 26(b), the unique circumstances doctrine and deeming notices to be motions for extensions of time.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, Catholic Healthcare West Arizona was a defendant below, and it has merged with respondent Catholic Healthcare West and is no longer a separate legal entity. St. Joseph's Hospital & Medical Center and Barrow Neurological Institute were defendants in the district court; neither is a respondent in this Court.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Ninth Circuit's amended opinion (Pet. App. 5-19) is reported at 602 F.3d 949. The district court's order and opinion granting summary judgment to respondents and denying summary judgment to petitions (Pet. App. 22-37) is unpublished. An order by the court below staying the proceedings on this appeal pending resolution of *Eisenstein* (Pet. App. 20-21) is unpublished. The Ninth Circuit's The Ninth Circuit's order amending its opinion and denying the petition for rehearing and for rehearing *en banc* (Pet. App. 1-4) is reported at 602 F.3d 949.

JURISDICTION

Judgment of the court of appeals was entered on February 4, 2010. The court denied the petition for rehearing and for rehearing *en banc* on April 21, 2010. On July 9, 2010, Justice Kennedy extended the time in which to file this petition to and including August 19, 2010. Application No. 10A30. A timely further extension request was denied on August 17, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RULES INVOLVED

1. Fed. R. App. P. 26(b):

"Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file ... a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal ..."

2. Fed. R. App. P. 2:

"Suspension of Rules. On its own or a party's motion, a court of appeals may--to expedite its decision or for other good cause--suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)."

3. Fed. R. App. P. 4(a)(5):

"Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a)

expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days[1] after the date when the order granting the motion is entered, whichever is later."

STATEMENT

This case presents a jurisdictional question of profound importance to this Court's supervisory responsibility for the federal judiciary. As the panel below noted in the published opinion, "when the notice of appeal was filed, this appeal was timely under then-controlling circuit law" (Pet. App. 6). After *Eisenstein* retroactively shortened the appeal period applicable to this case, however, the Ninth Circuit – which had stayed proceedings until *Eisenstein* was resolved – mistakenly felt it was constrained by footnote 4 to dismiss. In the panel's own opinion, calling this result "inequitable" is a "serious understatement" (Pet. App. 10).

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[1]Former Rule 4(a)(5)(C) set this time limit at 10 days.

The Ninth Circuit reached this admittedly unjust result because it concluded – contrary to the express terms of Rule 26(b) – that courts of appeals were powerless to grant a 30-day extension of the jurisdictional deadline as authorized in Rule 4(a)(5) for "good cause or excusable neglect." In so doing, the published opinion also avowed any authority to remedy the injustice through Rule 2, the unique circumstances doctrine, *nunc pro tunc* orders and the practice of deeming notices of appeal filed during the grace period to constitute motions for an extension of time. The Ninth Circuit's holding completely divests the appellate courts of equitable powers to extend the time in which to file a notice of appeal, based upon a misunderstanding of, and intense conflict with, this Court's decisions in *Eisenstein* and *Bowles v. Russell*.

This Court is the only authority to correct the Ninth Circuit's misconstruction of prior precedent. Petitioners suggest that this Court consider granting, summarily vacating and remanding the case to the Ninth Circuit. Whether summarily or plenary, answering the Question Presented in the affirmative – consistent with the express terms of Rule 26(b) – would restore a proper balance of equitable powers in the circuit courts, avoid difficult constitutional problems in this case, and resolve much confusion and numerous conflicts within and among the courts over the Federal Rules of Appellate Procedure and equitable doctrines available to the circuit courts

1. In *Eisenstein*, the Court was presented with a split between six circuits over whether parties in declined *qui tam* False Claims Act cases have 30 days

or 60 days in which to appeal. *Qui tam* actions are brought in the name of the United States, their judgments bind the government, and the government has in theory and practice taken appeals from judgments in actions where it had previously declined intervention. In the Third, Fifth, Seventh and Ninth Circuits, parties to a declined *qui tam* action expressly had up to 60 days in which to notice the appeal. *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 300-02 (3d Cir. 2008); *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996), *cert. denied* 520 U.S. 1211 (1997). As stated by the Ninth Circuit more than a decade before petitioners noticed their appeal: "It does not matter much whether the unsuccessful party in a *qui tam* action has a thirty day or a sixty day deadline for filing notice of appeal. What matters a great deal is that the unsuccessful party in district court be able to figure out which time period applies, easily, without extensive research, and without uncertainty." *Haycock*, 98 F.3d at 1101. Ten months after the *Haight* petitioners appealed, however, the Second Circuit in *Eisenstein* sided with a pre-1986 amendment ruling of the Tenth Circuit (*United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978)) adopting the 30-day period. This Court was thus presented with a clear conflict requiring intervention: when the government declines intervention, do the parties have 30 days or 60 days in which to notice the appeal?

The United States appeared as an *amicus* in *Eisenstein*. The government argued it is not a "party" in *qui tam* actions where it does not formally intervene under the False Claims Act. Although there were, are and will be instances where the government may want to enter into an appeal of a declined case, it objected to being considered a "party" in declined cases for other purposes, primarily the discovery rules.[2]

The petitioner in *Eisenstein* was not represented by counsel at the time he noticed his appeal. He had not relied upon legal precedent entitling him to the longer appeal period, and he did not seek an extension of time from either the district court or the appellate court as authorized under Rule 4(a)(5) and Rule 26(b). Eisenstein did not request this Court to rule prospectively only. Nor did he suggest that constitutional problems would arise from a retroactive changes in the jurisdictional rule. And he did not address whether appellate courts may grant a Rule 4(a)(5) 30-day extension in the absence of a motion in the district court.

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[2]As *amicus* in *Eisenstein*, the government did not address the constitutional issues associated with retroactive changes in the jurisdictional rules, and it did not address whether the appellate courts in circuits which previously recognized the 60-day rule had the power to grant a 30-day extension as authorized in Rule 4(a)(5). While petitioners understood the government to have advocated for the shorter 30-day appeal period in *Eisenstein*, they do not believe the government would oppose the relief sought by this Petition in *Haight*.

Petitioners here – Patricia Haight and In Defense of Animals – filed an *amici curiae* brief in *Eisenstein*. These *amici* were the sole voice in the briefing on the unfairness of a retroactive change to the jurisdictional rule. Given the obvious inequity that would be inflicted by changing the rules of procedure after the fact, petitioners here asked the Court in *Eisenstein* to rule prospectively only, in the event the shorter 30-day appeal period applied.

At oral argument, several justices were clearly troubled by the unfairness visited by a retroactive change. First, Justice Stevens pointed out that litigants from circuits where the law was settled on 60-days might be impacted by the adoption of the shorter time period. *See* April 21, 2009 Official Transcript, No. 08-660, at 26:18-27:13. Second, Justice Ginsburg pointed out that judgments in those jurisdictions that have completed the appeals route would not be subject to collateral attack by the retroactive change. *Id.*, at 27:15-23. Third, Justice Breyer queried whether to leave the change up to the rules committee, given that some circuits permit 60 days, "and those cases are already proceeding. So it's better to keep it where it is, which is 60 days, ..." *Id.*, at 32:7-14.

Fourth, Justice Alito asked the government: "What about the relators and the parties in the four circuits that have adopted the 60-day rule. They had a court of appeals opinion in front of them that said you had 60 days. They're just out of luck now?" *Id.*, at 46:8-12. And finally, although the Court could speak with clarity going forward, the prior existing law was expressly troubling to Chief Justice Roberts, who said

in concluding remarks: "So it's just a question of -- in this case and, as Justice Stevens pointed out, what the effect is going to be on other cases. And it seems to me that in that situation, 60 days makes the most sense because otherwise you're disrupting the system solely based on a trap for the unwary." *Id.*, at 47:5-11.

A unanimous Court issued a decision in *Eisenstein* less than two months after argument, however, holding that the shorter 30-day appeal period controls in declined *qui tam* actions. Although it did not address directly the *Haight amici* request for prospective application, the Court applied its interpretation of the rule to the case before it, thus requiring retroactive application to all pending cases. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (when a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law, and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule").

In footnote 4, the Court addressed Eisenstein's argument that a 30-day rule would "unfairly punish those who relied on the holdings of courts adopting the 60-day limit." Initially, it noted uncertainty as to the number of such cases still pending in the appellate courts. The Court then held even in the face of "possible harsh consequences" "the Court must nonetheless decide the jurisdictional question before it," citing *Torres v. Oakland Scavenger Co.*, 487 U. S. 312, 318 (1988). *See Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

While the Court in *Eisenstein* determined the applicable appeal period to be the shorter 30 days, and its ruling effectuated a retroactive change in the four identified circuits, it did not address any constitutional questions arising from any specific application. Further, there was no motion for an extension of time under Rule 26(b) and/or Rule 4(a)(5) in *Eisenstein*, and the Court did not address whether appellate courts are empowered to grant a 30-day extension of time for good cause and excusable neglect as authorized under Rule 4(a)(5). Uncertain of the number of other such cases and the extent of any retroactive change, the Court in footnote 4 left the fate of those cases open for the appellate courts to determine in the first instance. The footnote responds to the petitioner's argument, but it does not limit the relief which might otherwise be available to litigants based upon the circumstances.

2. Petitioners Haight and In Defense of Animals filed this *qui tam* action 2001. A first appeal resulted in a published Ninth Circuit decision on the "public disclosure" bar of the Act. 445 F.3d 1147, 1153 (9th Cir. 2006), *cert. denied* 549 U.S. 1077 (2006). After remand, the district court took briefing on cross-motions for summary judgment. On August 14, 2007, the district court granted summary judgment to respondents, denied summary judgment to petitioners and entered judgment (Pet. App. 22-37).

For more than a decade, the controlling law of the Ninth Circuit – and every other circuit to have looked at the question since the 1986 amendments – expressly permitted parties in declined *qui tam* actions 60 days to appeal. The Second Circuit did not even

create the circuit split until 10 months later, and practice guides in the Ninth Circuit taught practitioners that they had the full 60 days. *See Rutter Group Practice Guide Federal Ninth Circuit Civil Appellate Practice*, §§3:27-3:35. At the time of the appeal, everyone – the Ninth Circuit, respondents and their counsel, and certainly petitioners' experienced counsel – understood the time period for appeal to be 60 days.

Thirty days after entry of judgment, petitioners' counsel was in Washington, D.C., meeting with the government to discuss the anticipated appeal. Although it had not intervened, throughout the proceedings petitioners interacted with the government attorneys assigned to the case. From the moment the appeal was filed, until *Eisenstein*, the Ninth Circuit itself captioned this case with "United States of American" listed as "plaintiff." In the Answering Brief, respondents even cited the then-controlling decision in *Haycock* and acknowledged the appeal as timely under Ninth Circuit law. Nothing suggested the shorter 30 day period would be imposed.

3. After certiorari was granted in *Eisenstein*, but well before the ruling, petitioners moved the Ninth Circuit to grant a 30-day extension for good cause authorized in Rule 4(a)(5). While the express time extension periods of Rule 4 are immutable, courts have he power to grant those limited extensions authorized in the rule. Importantly, at the time of this appeal, the notice was timely filed, and no attorney – prudent or unwary – would have filed in the district court a motion for an extension of time.

Below, petitioners suggested several rules and doctrines on which to base authority in the appellate court to grant the extension. First and most obvious, Rule 26(b) expressly empowers courts of appeals to grant an extension of time for filing a notice of appeal as authorized in Rule 4. The rule states that. for "good cause, the court may extend the time prescribed by these rules or by its order to perform any act ..." Further, the rule states: "the court may not extend the time to file ... a notice of appeal (*except as authorized in Rule 4*) or a petition for permission to appeal ..." (emphasis supplied). By its plain text, Rule 26(b) empowers the circuit courts to extend the time for filing a notice of appeal as authorized in Rule 4. Had there been no authority in the courts of appeals to extend the jurisdictional deadline under Rule 4, the parenthetical exception would be superfluous.

Second, Rule 2 provides: "On its own or a party's motion, a court of appeal may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." The rule embodies the well accepted principles that "the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988). Rule 2 and its reference to Rule 26(b) together "confer broad equitable discretion on the courts of appeals to excuse compliance with the requirements of any and all Rules save the time limitations of Rule 4." *id.*, at 320 (Justice Brennan, dissenting).

Under Rule 2, courts may waive for "good cause" the requirement of a motion in the district court under Rule 4(a)(5) – a motion which was not needed and which no one expected to have been filed. Suspending the requirement of a district court motion does not itself extend the time to notice an appeal. The express time limit for an extension of the jurisdictional time period under Rule 4(a)(5)(C) is 30 days. Because petitioners noticed their appeal during the grace period, they do not need any more time than the 30 expressly authorized in the rule. Courts may not under Rule 2 extend the time for filing an appeal beyond that authorized by Rule 4, but they are not prohibited by Rule 2 from waiving the provision in Rule 4 requiring a motion first in the district court.

Third, the "unique circumstances" doctrine permits courts to extend the time for filing the notice of appeal up to the time extension limits contained in Rule 4. In *Bowles v. Russell*, a sharply divided Court held that use of the "unique circumstances" doctrine could not be used to extend time for filing a notice of appeal *beyond* the time extension limits authorized in Rule 4(a)(6). "Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate." 551 U.S. at 214. Neither the majority nor dissenting opinion in *Bowles* held that courts of appeals were stripped of equitable power to grant extensions authorized in Rule 4. The district court in *Bowles* had granted a reopening period of 17 days despite the rule's express time extension limit of 14 days. Here, petitioners seek only the 30-day extension authorized in Rule 4(a)(5)(C), and no more.

Fourth, courts commonly deem a notice of appeal filed with the district court within the 30-day extension period to constitute a motion for an extension. Parties are expressly entitled under Rule 4(a)(5) to move for the extension of time during the grace period. A notice of appeal filed then does what a Rule 4(a)(5) motion is designed to do: put the parties on notice of the appeal within strict time periods. In the criminal context today, and in the civil context prior to 1979, courts readily deem untimely notices of appeal filed within the extension periods to constitute motions for an extension. *E.g.*, *United States v. Jaramillo Montoya*, 335 F.3d 73 (2nd Cir. 2003) (applying liberal amendments to permit appeal noticed after the filing deadline but before running of extension period); *Stirling v. Chemical Bank*, 511 F.2d 1030 (2nd Cir. 1975) ("Nothing in Rule 4(a) precludes the district court, more than 60 days after entry of judgment, from granting an extension of time to sanction the late filing of a notice of appeal within the second half of the 60-day period, provided a purported notice of appeal has actually been filed within that period").[3]

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[3]Civil courts since the 1979 rule change continue to grapple with their equitable authority in this regard. See *Campos v. Le Fevre*, 825 F.2d 671, 675 (2nd Cir. 1987); *Sanders v. United States*, 113 F.3d 184 (11th Cir. 1997); "Untimely notice of appeal as motion for extension of time to appeal under Rule 4(a)(5) of the Federal Rules of Appellate Procedure," 74 ALR. Fed 775 (collecting cases). Recent decisions from the Ninth Circuit deemed the notices of appeal

(continued...)

Fifth, courts of appeals may retain jurisdiction and make a limited remand for determination of entitled to an extension under Rule 4, entering orders *nunc pro tunc* to the date of the initial judgment. *See United States v. Jaramillo Montoya*, 335 F.3d 73 (2nd Cir. 2003). Moreover, when the record is clear and there is no question that the litigant is entitled to the Rule 4(a)(5) extension, no remand is necessary. *Bateman v. United States Postal Service*, 231 F.3d 1220 (9th Cir. 2000). Here, there is no doubt that a retroactive change in settled law provides good cause under Rule 4(a)(5) for the 30-day extension. As Chief Judge Kozinski stated in dissent from the *en banc* opinion in *George v. Camacho*, 119 F.3d 1393, 1410-11 (9th Cir. 1997): if a party relied upon prior circuit interpretation of the jurisdictional filing deadline, "she would have been entitled to file her notice of appeal under a theory of excusable neglect; what, after all, could be more excusable than relying on a clear pronouncement of the court of appeals?"

4. Rather than completing the ordinary appeals route, the Ninth Circuit over petitioners' objections stayed proceedings pending the outcome in *Eisenstein*.

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[3](...continued)
in the district courts to constitute petitions for permission to appeal in the court of appeal, even though Rule 26(b) does not have the same exception for Rule 5 as it does for Rule 4. *See Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services*, 435 F.3d 1140 (9th Cir. 2006); *Blausey v. United States Treasury*, 552 F.3d 1124 (9th Cir. 2009).

As anticipated by the question of Justice Ginsburg during argument, the stay precluded petitioners from the protection that finality of judgments confers on litigants in connection with retroactive change.

After *Eisenstein*, the court below issued its amended opinion, terminating this long-running case without a merits hearing. The Ninth Circuit denied the motion for the time extension and dismissed the appeal for lack of jurisdiction. The court below said it "sympathized" with petitioners, "who complied with our precedent in filing their notice of appeal 51 days after the entry of judgment" (Pet. App. 19). It noted "when the notice of appeal was filed, this appeal was timely under then-controlling circuit law" (Pet. App. 6). It said calling the result here "inequitable" is a "serious understatement" (Pet. App. 10).

Based upon its reading of footnote 4, however, the court below felt compelled to rule as it did. According to the panel, "*Eisenstein* itself now represents ... a broad and inflexible application" of jurisdictional rule changes. "We are bound, then, to follow the Supreme Court's clear directive to apply *Eisenstein* retroactively, no matter how inequitable the result" (Pet. App. 10). The Ninth Circuit rejected petitioners' claim that retroactive rule changes raise serious constitutional questions. It concluded that petitioners "do not have a due process right to a late appeal" (*id.*.). Although Due Process was never even addressed in *Eisenstein*, the court below concluded this Court had fundamentally changed the landscape of constitutional analysis respecting retroactive application of changes in jurisdictional rules.

Even though Rule 26(b) expressly refers to the courts' authority to "extend the time to file . . . a notice of appeal ... as authorized in Rule 4," the Ninth Circuit held that "courts of appeals are not authorized to grant extensions" under Rule 4 (Pet. App. 12). In footnote 2, the Ninth Circuit avoided the obvious problem of construction by reading "the court" in Federal Rule of Appellate Procedure 26(b) to refer to the *district court* and not the courts of appeals. Nowhere else in the Federal Rules of Appellate Procedure is the district court referred to as "the court." History of Rule 26 shows its dependence on Rule 27, the rule for bringing motions in the courts of appeals. It is no surprise that Rule 4 – governing the proceedings prior to appeal – refers only to the district court, or that Rule 26(b) – governing the appellate courts' management of time rules – refers only to the court of appeals.

In denying petitioners the 30-day extension authorized in Rule 4(a)(5), the Ninth Circuit rejected each argument based on equity. The court concluded *Bowles v. Russell* prohibited equitable considerations in connection with the filing of notices of appeal, even to obtain equitable time limit extensions embodied in Rule 4. "We cannot extend the time to file a motion for an extension, waive the requirement of a timely motion, construe Plaintiffs' notice of appeal as such a motion, or grant such a motion--timely or not. Plaintiffs cannot obtain an extension of time from us" (Pet. App. 17). Nor did it believe it could rely upon "unique circumstances" or *nunc pro tunc* orders to obtain an extension and achieve justice (Pet. App. 17).

5. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents a jurisdictional question of profound importance to the operation of the federal judiciary. The Ninth Circuit held that appellate courts are powerless to grant the extensions of time expressly authorized in Rule 4(a)(5), even to avoid the serious due process questions raised by the retroactive shortening of petitioners' jurisdictional deadline. In the ruling below, the court ignores the plain text of Rule 26(b), and even reads out of the rule express language authorizing courts of appeals to grant extensions in Rule 4. The decision also misconstrues – and therefore directly conflicts with – this Court's decisions in *Eisenstein* and *Bowles*,.

It is essential that this Court grant the writ of certiorari and remedy the grossly inequitable result here. *Eisenstein* determined retroactively that petitioners had only 30 days to notice an appeal, but it did not bar other equitable relief permitted under the rules. Based upon these circumstances, very good cause exists for the Ninth Circuit to have granted the 30-day extension authorized in Rule 4(a)(5). Because the court below erroneously assumed that this Court had foreclosed equitable considerations, the Ninth Circuit concluded it was without equity powers. A writ is the only mechanism to obtain relief.

Petitioners request this Court grant the petition for a writ, summarily vacate the judgment and remand the case to the Ninth Circuit. The court below should determine in the first instance whether petitioners are entitled to one 30-day extension of time based upon the good cause provision of Rule 4(a)(5).

Answering the Question Presented in the affirmative would avoid serious constitutional problems presented by this case. It would also readily resolve much confusion and harmonize several conflicts between and among the courts over equitable doctrines to extend the time for filing an appeal.

1. The Ninth Circuit Decision Conflicts With The Decisions By This Court and With The Express Text of Rule 26(b)

A. Footnote 4 in *Eisenstein* did not alter long-standing jurisprudence on the implications for Due Process by retroactive changes in jurisdictional rules. *Eisenstein* did not address constitutional questions at all. Petitioner there did not raise any such issues, and this Court would not have resolved constitutional claims that were not raised. Although the Court in *Eisenstein* rigidly applied its jurisdictional ruling to pending cases, it left the "possible harsh consequences" to be meted out by the circuits, as need be. The Court certainly did not rule on the power of the appellate courts to grant extensions authorized in Rule 4(a)(5).

It is of fundamental importance to litigants and the judiciary that controlling law be considered binding in nature, even jurisdictional rules. Parties must be able to know and rely upon pronouncements by the circuits and this Court. Jurisdictional rules are no less deserving. Litigants such as petitioners here have every right – and indeed are obligated – to adhere to the jurisdictional rulings of the courts. Fair and equitable operation of the judicial system requires that parties be given fair notice of any changes to those rules and the opportunity to conform to them.

In 2007 when this appeal was taken, there was no way for petitioners to know that Ninth Circuit controlling law for more than a decade was not to be followed. Indeed, if jurisdictional rules are subject to retroactive changes without notice, even the prior pronouncements of this Court are not stable. Those too may be overruled at some point in the future. A truly careful appellate practitioner would have to adhere to the most restrictive possible rulings on every jurisdictional issues to be truly safe.

This Court has held serious constitutional questions are raised by retroactive changes to jurisdictional rulings. Because it would be constitutionally suspect to upset settled expectations, the Court refused to rule retroactively in *Northern Pipeline v. Marathon Pipeline* 458 U.S. 50, 87 (1982) (plurality opinion); *id.* at 92 (Rehnquist, J., concurring in the judgment) (agreeing with the plurality's retroactivity discussion).

In *George v. Camacho*, 119 F.3d 1393, 1404 (9th Cir. 1997), the Ninth Circuit *en banc* stated the constitutional concerns most clearly: "Rules are intended to provide certainty and to guide parties' actions. Making a rule shortening time for filing retroactive is inconsistent with both of these objectives. ... To propound a rule that prescribes a period of time within which litigants are free to appeal, and then to determine subsequently that the rule is erroneous and dismiss appeals that complied with it when filed, would undermine confidence in the judicial system. Moreover, contrary to the very objectives of a fixed time period for filing, applying our changed rule

retroactively would unsettle matters that had already been settled, cast into doubt the practice of relying on the court's construction of the federal rules, and penalize parties whose conduct faithfully conformed to our determinations."

Retroactive change to Rule 4's mandatory deadline resulting in the termination of this case without a merits hearing would be unconscionable, as it is "contrary to fundamental principles of fairness and due process of law, and would call into question the very integrity of this court's processes." "Announcing a rule that allows litigants a specific period of time within which to appeal and then several years later declaring that we've changed our minds and will not recognize appeals that were filed within the proscribed period would be carrying the 'gotcha' principle beyond all previous limits. It would also be wholly unprecedented." *Id.*, 119 F.3d at 1396-97.

"Considerations of fairness that presumptively prohibit retroactive application of the law are essential in a free, dynamic society [where] creativity . . . is fostered by a rule of law that gives people confidence about the consequences of their legal actions.' For that reason, among others, courts are reluctant to 'sweep away settled expectations suddenly . . . .' It would be difficult to imagine a more compelling circumstance for abiding by established legal rules than is presented in the case before us - a case in which we are asked to hold that time limits established by court decisions construing the Federal Rules of Appellate Procedure may be shortened without prior notice to litigants, and that the new time limits may be applied retroactively

to pending appeals that were timely filed under our court-announced rule. The consequence of such a holding would be that litigants who complied with our rules by timely filing their appeals in accordance with our instructions would lose their rights to appeal, thereby forfeiting whatever underlying interests may have been affected by adverse district court decisions. Moreover, we are asked to hold that we are compelled to reach that result - a result that would appear to be unconscionable to most reasoning persons whether learned in the law or not." *Id.* (citations omitted).

The panel here failed to even acknowledge the existence of these concerns. Petitioners do not ask now that *Eisenstein* be applied prospectively on the basis of Due Process analysis. Instead they contend it was error for the court below to hold that these difficult and serious constitutional issues were absent. It is a cardinal rule that courts should construe a statute or rule in a way that avoids making unnecessary constitutional decisions when permissible in light of its language. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 778 (2005); *Bellotti v. Baird*, 428 U.S. 132, 146-51 (1976). Here, the Ninth Circuit should have interpreted the rules to avoid the constitutional problems presented by the circumstances of retroactive application. The Ninth Circuit instead side-stepped the constitutional questions, taking refuge in its reading of false constraint by *Eisenstein*. Under the panel's view, once this Court retroactively determined the notice to be tardy, petitioners automatically lost their Due Process rights. Their "opportunity" to appeal was illusory and ultimately evaporated *because* they adhered to the controlling circuit rule.

B. In *Bowles v. Russell*, a majority of this Court held federal courts were powerless to exceed the limited time extension periods embodied into Rule 4. But the Court did not hold courts were incapable of granting jurisdictional extensions that were actually written into the rule. Both the majority and dissenting opinions in *Bowles* presumes that power, for the discussion of authority to exceed the rule-based time limits assumed a more limited authority to grant the extension stated in the rule. Here in *Haight*, the Ninth Circuit sorely misunderstood the holding and implications of *Bowles*, finding an intent in this Court to completely squelch any and all equitable powers in connection with Rule 4.

The Ninth Circuit's pivotal misreading of *Bowles* is demonstrated by its discussion of petitioners' Due Process rights: "Plaintiffs do not have a due process right to a late appeal, even if they effectively had our court's permission under *Haycock* to file after Rule 4's deadline, any more than Mr. Bowles had the right to a late appeal when he had the district court's express permission to do likewise" (Pet. App. 11). Petitioners Haight and In Defense of Animals seek only the 30-day extension expressly stated in Rule 4(a)(5). In contrast, in *Bowles v. Russell*, Mr. Bowles sought a 17-day extension of time even though the rule's limited time period was 14 days. There, the appellant sought to use the district court's erroneous order to exceed the jurisdictional time limits for extensions. Here, petitioners rely upon the retroactive change in the jurisdictional rule to obtain access to an extension of time within the terms of Rule 4. Mr. Bowles' situation is inapposite in several important ways.

The lower court's misreading of *Bowles* directly subverts even-handedness in the legal application of the Rule 4(a)(5) extensions. All of the Court's factors under *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) for extensions grounded on "excusable neglect" or "good cause" are met in this case. This is true for the most important factor in determining "excusable" neglect – the reasons for the delay. *See Pincay v. Andrews*, 389 F.3d 853, 861 (9th Cir. 2004) (Kozinski, J., dissenting). Rather than being "neglectful," appellants must be considered "litigants who complied with our rules by timely filing their appeals in accordance with our instructions" and who should not "lose their rights to appeal, thereby forfeiting whatever underlying interests may have been affected by adverse district court decisions." *George*, 119 F.3d at 1397. Appellants carefully monitored and calendared filing deadlines in reliance upon this Court's construction. They are "parties whose conduct faithfully conformed to our determinations." *Id.* at 1404.

Pincay – another *en banc* decision from the Ninth Circuit – demonstrates the inequity. There, an appellant was permitted to proceed on a late-noticed appeal based upon the excusable neglect provision of Rule 4(a)(5). In that case, the law firm relied on a non-lawyer's erroneous belief that the party had 60 days to appeal. The majority found the extension of time warranted. Judge Kozinski, writing in dissent, would not have found the neglect to be "excusable" because, at bottom, the "lawyer didn't bother to read the rule." Pincay, 389 F.3d at 862.

Granting relief in cases such as *Pincay* but denying it here shows the unworkability of the opinion below. In *Pincay*, appellant's "lawyer didn't bother to read the rule," *Pincay*, 389 F.3d at 862; but here, the lawyer read the rule and Ninth Circuit's construction of it. If the firm in *Pincay* is to be excused for filing an appeal that was untimely when filed, petitioners here should not be penalized for following filing a petition that was in fact timely under settled law when it was filed. Under the decision below, an attorney who does not timely follow the rules in a jurisdiction which already prescribed the shorter time period would have the opportunity to apply under Rule 4(a)(5) and get relief; but an attorney who knows the Circuit law on the time for appeal and comes from a jurisdiction which allowed the longer appeal period would have no meaningful opportunity to obtain the same relief.

C. Rule 26(b) expressly empowers the courts of appeals to grant an extension of time to file a notice of appeal as authorized in Rule 4. That language would be meaningless if the Ninth Circuit is correct that courts of appeals have no power to grant the extension. The panel's basis for avoiding this compelling argument of the rule's construction is to make its reading of the rule even worse. Rule 26(b) – historically tied to the subsequent Rule 27 – must refer to the power of the courts of appeals, not the district courts. The Federal Rules of Appellate Procedures "govern procedures in the United States courts of appeals" and they refer specially and expressly to the rules of the district court when that is the intent. *See* Rule 1. Rule 26(b) thus does not refer to extensions granted by motion before the district court.

To avoid the serious constitutional questions raised by retroactive change in the jurisdictional rules, this Court should grant the petition. It should reasonably interpret Rule 26(b) according to its plain terms and find the rules of appellate procedure empower courts of appeals to grant Rule 4(a)(5) extensions for good cause and excusable neglect.

2. Answering The Question Presented In The Affirmative Would Resolve Significant Conflicts and Substantial Confusion Over Several Important Rules and Doctrine

A.. By holding that courts of appeals have power to grant an extension of time to file a notice of appeal as authorized in Rule 4(a)(5), this Court would resolve the conflict created by the panel decision below and the express language of Rule 26(b). As is seen by Ninth Circuit decisions here and in *United States v. Arevalo*, 408 F.3d 1233 (9th Cir. 2005), there is some significant confusion in the federal courts over Rule 26(b)'s reference to power of the courts of appeals under Rule 4, while Rule 4 itself is silent on the powers of the courts of appeal. As explained, this is not surprising, since Rule 4 operates prior to the commencement of the appellate process, and Rule 26(b) would come in play after the appeal begins. Rule 4 would not be expected to refer to motions in the appellate courts, and Rule 26(b) could not be interpreted to apply to the district courts. A grant of the writ here with an affirmative answer to the Question Presented would clarify this confusion and harmonize the two separate but related rules for extending time.

B. A holding by this Court that appellate courts may engage in equitable considerations in determining whether to grant a limited time extension authorized in Rule 4 would resolve conflicts and harmonize opinions between and among the federal courts over the deeply divided *Bowles* Court decision. Because the issue which divided the *Bowles* Court is absent here, justices who would side with either the majority or the dissenting opinions in *Bowles* today would come together on a unified principle. Much confusion has followed the *Bowles* decision, which has been criticized because of its apparent breadth. Recognition of the appellate courts' authority – and obligation – to engage in equity under express rules, while simultaneously limiting *Bowles* to requests for extra-jurisdictional relief, would resolve that confusion and provided much needed guidance to the circuit courts.

C. Inconsistencies surrounding the practice of "deeming" the filing of a notice of appeal in the district court during the grace period to constitute a motion to extend time cry out for this Court's resolution. In the criminal context, courts regularly feel compelled by Due Process considerations to recognize a late-filed notice of appeal to be a timely motion under Rule 4. This is a confusing distinction that should not make a difference, as the Due Process clause applies to civil as well as criminal cases. Similarly, prior to 1979, courts regularly viewed notices of appeal filed after the expiration of the appeal period but during the 30-day extension period in civil cases to constitute Rule 4 motions. While the sea changed after the 1979 rule change, it is clear by the history of the rules that the drafters did not concern themselves with the practice

of deeming notices to be motions. If anything, it is more likely that the Rule 26(b) clarifying amendment in 1998 was in response to opinions like the dissent by Judge Kozinski in *George*, where the appellate court's ability to grant the Rule 4(a)(5) extension of time was essential to the reasoning.

D. Answering the Question Presented with a yes would also resolve confusion surrounding the nexus between Rule 2 and "jurisdictional rules." While the proviso to Rule 2 precludes courts of appeals from waiving the time limits of Rule 4 and Rule 5 (by reference to Rule 26(b)), there is no clarity of source or content in the principle – adopted by the Ninth Circuit below – that Rule 2 can never be used in connection with "jurisdictional rules." In this case, there were no grounds upon which the panel could appropriately conclude that the filing of a motion in the district court for a good cause extension – as opposed to the express requirements of good cause and limitations on time periods – were a jurisdictional requirement. Rule 2's reference to Rule 26(b)'s "time limits" indicates that only the limited periods of time are inviolate. But until this Court addresses the issue, as it would in this case, the courts will go without guidance on what is and is not a jurisdictional rule.

3. This Court Should Grant Certiorari, Summarily Vacate the Judgment, and Remand For a Determination of Whether Petitioners Are Entitled To A 30-Day Extension Of Time For Good Cause Or Excusable Neglect

This case is excellent for application of the Court's practice of granting the writ of certiorari and summarily vacating the judgment below. Rather than being a maturing line of analysis developed between and among the circuits, the erroneous opinion below was predicated on a clear misunderstanding of this Court's decisions in *Eisenstein* and *Bowles*. It was also based on an undeniable misreading of Rule 26(b). As such, summary reversal is appropriate and plenary review may not be warranted.

To guide the Ninth Circuit on remand, the Court should directly answer the Question Presented in the affirmative. It should clarify that *Eisenstein* does not preclude a discussion of the Due Process concerns raised by retroactive changes in the jurisdictional rules. It should further clarify that *Bowles* does not obstruct courts from making equitable considerations for the purposes of seeking time extensions within – not beyond – the limits of Rule 4.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2010

UNITED STATES OF AMERICA ex rel. PATRICIA HAIGHT and IN DEFENSE OF ANIMALS, Plaintiffs-Appellants, v. CATHOLIC HEALTHCARE WEST; CATHOLIC HEALTHCARE WEST ARIZONA; ST. JOSEPH'S HOSPITAL AND MEDICAL CENTER; BARROW NEUROLOGICAL INSTITUTE; and MICHAEL BERENS, Defendants-Appellees.

No. 07-16857

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

602 F.3d 949; 2010 U.S. App. LEXIS 8637

April 21, 2010, Decided

COUNSEL: Jeremy L. Friedman, Law Office of Jeremy L. Friedman, Oakland, California, for the plaintiffs-appellants.

Dale A. Danneman, Lawrence A. Kasten, and Brian J. Pollock, Lewis and Roca LLP, Phoenix, Arizona, for defendants-appellees.

JUDGES: Before: Betty B. Fletcher, William C. Canby, Jr., and Susan P. Graber, Circuit Judges.

OPINION

ORDER

The opinion filed on February 4, 2010, slip opinion page 2057, and appearing at 594 F.3d 694, is amended as follows:

On slip opinion page 2063, line 2 of the last paragraph, change the comma to a period after "'inequitable.'"; on line 9, after "harsh consequences.')." insert:

> Notwithstanding the Supreme Court's guidance, Plaintiffs urge us to follow *George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997) (en banc), in which we refused to apply retroactively our decision to shorten the time period for filing a notice of appeal from the Northern Mariana Islands. But our premise in *George* was that the Supreme Court's admonition that "'a jurisdictional ruling may never be made prospective only' . . . has never been applied as broadly and inflexibly as both its language and our dissenting colleagues suggest." *Id.* at 1397 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981)). *Eisenstein* itself now represents just such a broad and inflexible application of that principle. We are bound, then, to follow the Supreme Court's clear directive to apply *Eisenstein* retroactively, no matter how inequitable the result.

Also on line 9, start a new paragraph with "A claim that this result violates due process is equally unavailing."

On slip opinion page 2065, line 8 of the first full paragraph, after "under Rule 4," insert the following as a footnote:

> When *In re Hoag* announced that Rule 4 did not authorize such an action by the court of appeals, Rule 26 did not contain the exception cross-referencing Rule 4. In 1988, Rule 26(b) provided:
>
> > The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.
>
> Rule 26 was amended in 1998. However, the 1998 amendments to Rule 26(b) were "intended to be stylistic only." 28 U.S.C. app., Fed. R. App. P. 26 advisory committee's notes (1998 amendment); *see also Mitchell v. Burtvetterlein & Bushnell PC (In re Stein)*, 197 F.3d 421, 424 n.7 (9th Cir. 2000) (noting that the 1998 amendments to Federal Rule of Appellate Procedure 4(a)(5) were "strictly stylistic"). Thus, the 1998 amendments did not abrogate *In re Hoag*. Nor are the amendments irreconcilable with *In re Hoag*. By its terms, Rule 26(b) still applies to "the court." The statement that "the court" may grant extensions of time "as authorized by

> Rule 4" recognizes the power of the *district* court to grant extensions under Rule 4, but not beyond the limitations of Rule 4. Thus, the phrase "as authorized by Rule 4" is not surplusage, even though the court of appeals has no power to grant extensions under Rule 4.

On slip opinion page 2066, last line, after the citation to *Pettibone*, insert the following as a footnote:

> Like *In re Hoag*, *Pettibone* survives the 1998 amendments to Rule 26(b).

With these amendments, the panel has voted to deny the petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc, and Judges B. Fletcher and Canby have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing will be entertained.

UNITED STATES OF AMERICA ex rel. PATRICIA HAIGHT and IN DEFENSE OF ANIMALS, Plaintiffs-Appellants, v. CATHOLIC HEALTHCARE WEST; CATHOLIC HEALTHCARE WEST ARIZONA; ST. JOSEPH'S HOSPITAL AND MEDICAL CENTER; BARROW NEUROLOGICAL INSTITUTE; and MICHAEL BERENS, Defendants-Appellees.

No. 07-16857

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

602 F.3d 949; 2010 U.S. App. LEXIS 8638

November 3, 2009, Argued and Submitted, San Francisco, California

April 21, 2010, Amended

COUNSEL: Jeremy L. Friedman, Law Office of Jeremy L. Friedman, Oakland, California, for the plaintiffs-appellants.

Dale A. Danneman, Lawrence A. Kasten, and Brian J. Pollock, Lewis and Roca LLP, Phoenix, Arizona, for defendants-appellees.

JUDGES: Before: Betty B. Fletcher, William C. Canby, Jr., and Susan P. Graber, Circuit Judges.

OPINION BY: Susan P. Graber

OPINION

AMENDED OPINION

GRABER, Circuit Judge:

Plaintiffs filed a notice of appeal in this *qui tarn* action 51 days after the district court granted summary judgment in favor of Defendants. We must dismiss this appeal for lack of jurisdiction because Plaintiffs filed the notice of appeal more than 30 days after the entry of judgment. Fed. R. App. P. 4(a)(1)(A). When the notice of appeal was filed, this appeal was timely under then-controlling circuit law that gave Plaintiffs 60 days to file an appeal, but dismissal is now required by an intervening Supreme Court decision ruling that the allowable time is 30 days.

FACTUAL AND PROCEDURAL HISTORY

Defendant Michael Berens is a scientist who applied for and received funding from the National Institutes of Health to research brain cancer using beagle dogs. Plaintiffs Patricia Haight and In Defense of Animals assert that Berens made false and misleading statements in his grant application. They allege that he failed to disclose data showing a high rate of failure in preliminary trials, made false statements about the extent of his success with the research, stated a goal for the grant project that he did not believe could actually be accomplished, and misrepresented another researcher's involvement with the project. Consequently, Plaintiffs brought this *qui tarn* action against Defendants Berens, Barrow

Neurological Institute, St. Joseph's Hospital and Medical Center, Catholic Healthcare West Arizona, and Catholic Healthcare West under the False Claims Act, 31 U.S.C. § 3729. The United States has a statutory right to intervene in such a suit, *id.* § 3730(b)(2), but declined to intervene in this one.

The first issue arising in this litigation was whether the False Claims Act's "public disclosure" jurisdictional bar, *id.* § 3730(e)(4), precluded the suit. In an earlier appeal, we held that the suit was not barred by the fact that Plaintiffs had obtained Berens' grant application pursuant to a Freedom of Information Act request. *United States ex rel. Haight v. Catholic Healthcare W.*, 445 F.3d 1147, 1152 (9th Cir. 2006). On remand, the district court granted summary judgment in favor of Defendants, ruling that Plaintiffs had failed to produce evidence that the statements at issue were objectively false.

The district court entered judgment for Defendants on August 14, 2007. Plaintiffs filed a notice of appeal 51 days later, on October 4, 2007. We stayed the appeal pending Supreme Court review of *United States ex rel. Eisenstein v. City of New York*, 540 F.3d 94 (2d Cir. 2008). The Supreme Court has issued its decision, 129 S. Ct. 2230, 173 L. Ed. 2d 1255 (2009), and we now consider Defendants' motion to dismiss this appeal as untimely. We review de novo the existence of jurisdiction over an appeal. *Perez-Martin v. Ashcroft*, 394 F.3d 752, 756 (9th Cir. 2005).

DISCUSSION

A. Untimely Notice of Appeal

Under Federal Rule of Appellate Procedure 4(a)(1), a party in a civil suit has 30 days from the entry of judgment within which to file a notice of appeal, unless "the United States or its officer or agency is a party." If the United States is a party, Rule 4(a)(1)(B) allows a 60-day period within which to take an appeal. For purposes of Rule 4(a), we previously held that the United States is a "party" to a *qui tarn* action even if it declines to intervene. *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996). Thus, when the district court entered judgment for Defendants, our circuit precedent gave the plaintiffs in a case such as this one 60 days to file a notice of appeal.

Relying on *Haycock*, Plaintiffs filed their notice of appeal 51 days after the entry of judgment. At that time, we would have deemed their appeal timely. But while this appeal was pending, the Supreme Court held that, for the purposes of the filing deadlines of Rule 4(a), the United States is *not* a party to a *qui tarn* action under the False Claims Act in which it declines to intervene and plaintiffs in such cases have only 30 days to appeal. *Eisenstein*, 129 S. Ct. at 2236-37. We therefore recognize that *Eisenstein* overruled our holding to the contrary in *Haycock*.

Under *Eisenstein*, Plaintiffs' notice of appeal was untimely when filed. The Supreme Court knew that *Eisenstein* could affect pending appeals. Indeed,

Plaintiffs in this case filed an amicus brief with the Supreme Court asking that it prohibit retroactive application of its decision in *Eisenstein*. Brief for Patricia Haight and *In Defense of Animals as Amici Curiae Supporting Respondents, United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 173 L. Ed. 2d 1255 (2009) (No. 08-660). Despite acknowledging that its decision would have "harsh consequences" for some plaintiffs and "unfairly punish those who relied on the holdings of courts adopting the 60-day limit in cases in which the United States was not a party," the Court expressly refused to limit its decision to prospective application. *Eisenstein*, 129 S. Ct. at 2236 n.4. Those harsh consequences are now concretely before us: Plaintiffs' appeal is untimely and must be dismissed.

A timely notice of appeal is a jurisdictional prerequisite. *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 264, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978). Congress has set a statutory limit of 30 days on appeals in cases to which the United States is not a party. 28 U.S.C. § 2107(a). A would-be appellant's "failure to file his notice of appeal in accordance with the statute therefore deprive[s] the Court of Appeals of jurisdiction." *Bowles v. Russell*, 551 U.S. 205, 213, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007). Because the notice of appeal in this case was filed after the 30-day deadline, we lack jurisdiction and this appeal must be dismissed. *Id*; *United States v. Curry*, 47 U.S. (6 How.) 106, 113, 12 L. Ed. 363 (1848).

It is a serious understatement to call this result "inequitable." *Bowles*, 551 U.S. at 214. Plaintiffs reasonably relied on Ninth Circuit precedent that gave them 60 days to file a notice of appeal. But the Supreme Court has instructed us that concerns of equity must give way before the "rigorous rules" of statutory jurisdiction. *Id.*; *see also Eisenstein*, 129 S. Ct. at 2236 n.4 ("[T]he Court must nonetheless decide the jurisdictional question before it irrespective of the possibility of harsh consequences."). Notwithstanding the Supreme Court's guidance, Plaintiffs urge us to follow *George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997) (en banc), in which we refused to apply retroactively our decision to shorten the time period for filing a notice of appeal from the Northern Mariana Islands. But our premise in *George* was that the Supreme Court's admonition that "'a jurisdictional ruling may never be made prospective only' . . . has never been applied as broadly and inflexibly as both its language and our dissenting colleagues suggest." *Id.* at 1397 (quoting *Firestone Tire &. Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981)). *Eisenstein* itself now represents just such a broad and inflexible application of that principle. We are bound, then, to follow the Supreme Court's clear directive to apply *Eisenstein* retroactively, no matter how inequitable the result.

A claim that this result violates due process is equally unavailing. "As [the Supreme Court's] decisions have emphasized time and again, the Due

Process Clause grants the aggrieved party the *opportunity* to present his case. . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (emphasis added). Plaintiffs do not have a due process right to a late appeal, even if they effectively had our court's permission under *Haycock* to file after Rule 4's deadline, any more than Mr. Bowles had the right to a late appeal when he had the district court's express permission to do likewise. *Bowles*, 551 U.S. at 207.

Plaintiffs correctly note that the Supreme Court's holding in *Eisenstein* does not foreclose the theoretical possibility that other parts of the Federal Rules of Appellate Procedure could provide an avenue of relief. We consider their suggestions below, but conclude that none is viable.

B. Motion for Extension of Time

On February 6, 2009, Plaintiffs filed a motion with us for extension of time within which to file a notice of appeal. Plaintiffs ask us to grant this motion under Federal Rule of Appellate Procedure 4(a)(5). That rule authorizes a district court to grant an extension of time under certain circumstances, but is silent as to the authority of a court of appeals. We have held that Rule 4(a)(5) grants no power to a court of appeals. *Hoag Ranches v. Stockton Prod. Credit*

Ass'n (In re Hoag Ranches), 846 F.2d 1225, 1229 (9th Cir. 1988) (order).[1]

Furthermore, Rule 4(a)(5)(A)(i) requires that a party move for extension of time "no later than 30 days after" the expiration of the time allotted for an appeal. Plaintiffs' motion for an extension of time is itself almost four months late. Rule 4 does not authorize late motions. Thus, even if we had the power to grant motions for extensions of time under Rule 4(a)(5), we would still have to deny Plaintiffs' motion because the motion itself is untimely.

Nor may we, under Rule 26, grant an extension of time to file the notice of appeal. Rule 26 generally gives us the power to extend any of the deadlines prescribed by the Federal Rules of Appellate Procedure. However, that rule specifically provides that "the court may not extend the time to file . . . a notice of appeal (except as authorized in Rule 4)." As already explained, courts of appeals are not authorized to

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[1] Plaintiffs direct our attention to *United States v. Arevalo*, 408 F.3d 1233, 1239 (9th Cir. 2005), in which we "express[ed] no opinion . . . whether Rule 4's silence precludes an appellate court from granting an extension." As a threshold matter, declining to reach an issue that we have already decided in an earlier case does not invalidate the earlier decision. But in any event, *Arevalo* was a criminal case under Rule 4(b), not a civil case under Rule 4(a). Thus, the fact that *Arevalo* treated the court of appeals' authority under Rule 4(b) as an open question does not undercut the holding of *In re Hoag* or its application to Plaintiffs' appeal.

grant extensions under Rule 4[2] and, even if we were, Plaintiffs' motion cannot be granted because it is untimely. Therefore, Rule 26 does not allow us to extend the time for Plaintiffs to file their notice of appeal.

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[2] When *In re Hoag* announced that Rule 4 did not authorize such an action by the court of appeals, Rule 26 did not contain the exception cross-referencing Rule 4. In 1988, Rule 26(b) provided:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.

Rule 26 was amended in 1998. However, the 1998 amendments to Rule 26(b) were "intended to be stylistic only." 28 U.S.C. app., Fed. R. App. P. 26 advisory committee's notes (1998 amendment); *see also Mitchell v. Burtvetterlein & Bushnell PC (In re Stein)*, 197 F.3d 421, 424 n.7 (9th Cir. 2000) (noting that the 1998 amendments to Federal Rule of Appellate Procedure 4(a)(5) were "strictly stylistic"). Thus, the 1998 amendments did not abrogate *In re Hoag*. Nor are the amendments irreconcilable with *In re Hoag*. By its terms, Rule 26(b) still applies to "the court." The statement that "the court" may grant extensions of time "as authorized by Rule 4" recognizes the power of the *district* court to grant extensions under Rule 4, but not beyond the limitations of Rule 4. Thus, the phrase "as authorized by Rule 4" is not surplusage, even though the court of appeals has no power to grant extensions under Rule 4.

Similarly, we may not, under Rule 26(b), extend the time to file the motion seeking an extension. Rule 4(a)(5)(A)(i) requires a motion "no later than 30 days after" the deadline for a notice of appeal. If we were to extend the time for Plaintiffs to file their motion by four months – and if we had the power to then grant the requested extension – the resulting extension would violate Rule 26(b)(1) because it would *not* be an extension "as authorized in Rule 4."

Plaintiffs also argue that, under Rule 2, we could suspend the requirement that a would-be appellant file a timely motion before a court may grant an extension. Again, even if we were to waive that requirement, we have no power to grant an extension of time. *In re Hoag*, 846 F.2d at 1229. But Rule 2 does not permit us to suspend the requirement that a timely motion be filed in the first place. By its own terms, Rule 2 allows the court of appeals to "suspend any provision . . . except as otherwise provided in Rule 26(b)." Rule 26(b), as noted above, provides that a court may not extend the time to file a notice of appeal except as authorized by Rule 4. Rule 4 does not authorize an extension of time to appeal except upon a timely motion. Thus, Rule 26(b) forbids an extension of time to file the motion, and Rule 2 prohibits suspending the requirement of a timely motion. Rule 2 and Rule 26(b) do not assist a party who has failed to file a timely motion for extension of time.

We are not alone in reading the rules this way. The Fifth Circuit similarly has held that Rule 2 and its cross-reference to Rule 26(b) prevent a court of

appeals from suspending the requirements of Rule 4(a)(6), which – like Rule 4(a)(5) – demands filing a timely motion in order to enlarge the time to file an appeal. *Wilkens v. Johnson*, 238 F.3d 328, 334-35 (5th Cir. 2001), *superseded by rule on other grounds as recognized by Resendiz v. Dretke*, 452 F.3d 356, 358 n.3 (5th Cir. 2006).

Our conclusion as to Rule 2 is reinforced by the Supreme Court's admonition that a court "may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988). And the requirement of a timely motion under Rule 4(a)(5) is a jurisdictional one. We so held, in *Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1411 (9th Cir. 1986) (per curiam), even before *Bowles* instructed us that timeliness limitations enacted by statute are jurisdictional, 551 U.S. at 212-13. Congress specified in 28 U.S.C. § 2107(c) that a court may grant an extension "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal." The requirement of a motion within 30 days is, thus, created by statute. It could not be waived under Rule 2, even if Rule 2 purported to authorize such action. *Torres*, 487 U.S. at 317.

Plaintiffs also request that we construe their notice of appeal as a motion for extension of time. If we were to do so, the motion would be timely, but we still would lack the power to grant it. *In re Hoag*, 846

F.2d at 1229. More importantly, though, we have held that we cannot construe a notice of appeal as a motion for extension of time under Rule 4(a)(5). *Pettibone v. Cupp*, 666 F.2d 333, 335 (9th Cir. 1981).[3] *Blausey v. U.S. Trustee*, 552 F.3d 1124 (9th Cir. 2009) (per curiam), and *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140 (9th Cir. 2006) (order), are not to the contrary. *Blausey* and *Amalgamated* Transit arose under Rule 5, governing permissive appeals, rather than under Rule 4. *Pettibone* controls here. Indeed, in refusing to treat a notice of appeal as a motion for extension of time under Rule 4(a)(5), we agree with all the other circuits that have ruled on the issue. *Campos v. Le Fevre*, 825 F.2d 671, 675-76 (2d Cir. 1987); *United States ex rel. Leonard v. O'Leary*, 788 F.2d 1238, 1239-40 (7th Cir. 1986) (per curiam); *Herman v. Guardian Life Ins. Co. of Am.*, 762 F.2d 288, 289-90 (3d Cir. 1985) (per curiam); *Myers v. Stephenson*, 748 F.2d 202, 204 (4th Cir. 1984); *Campbell v. White*, 721 F.2d 644, 645-46 (8th Cir. 1983); *Pryor v. Marshall*, 711 F.2d 63, 64-65 (6th Cir. 1983); *Brooks v. Britton*, 669 F.2d 665, 667 (11th Cir. 1982); *Bond v. W. Auto Supply Co.*, 654 F.2d 302, 303-04 (5th Cir. 1981); *Mayfield v. U.S. Parole* Comm'n, 647 F.2d 1053, 1055 (10th Cir. 1981) (per curiam); *see also Wyzik v. Employee Benefit Plan of Crane Co.*, 663 F.2d 348, 348 (1st Cir. 1981) (per curiam) (declining to treat a notice of appeal as a

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[3] Like *In re Hoag*, *Pettibone* survives the 1998 amendments to Rule 26(b).

motion for extension, but reserving question of "[w]hether or not in truly extraordinary circumstances beyond the ability of counsel to foresee or guard against, a court would have any flexibility").

We cannot extend the time to file a motion for an extension, waive the requirement of a timely motion, construe Plaintiffs' notice of appeal as such a motion, or grant such a motion – timely or not. Plaintiffs cannot obtain an extension of time from us.

C. Unique Circumstances Doctrine

Plaintiffs also wish us to permit their untimely appeal under the "unique circumstances" doctrine. Plaintiffs recognize that *Bowles* described the equitable doctrine as "illegitimate" insofar as it "purport[s] to authorize an exception to a *jurisdictional* rule." 551 U.S. at 214 (emphasis added). They argue, however, that the doctrine could still be applied to non-jurisdictional rules. But no non-jurisdictional rules bar Plaintiffs' appeal. The requirement of a timely notice of appeal is jurisdictional, *id.* at 209, as is the requirement that a would-be appellant file a timely motion for an extension of time before such an extension may be granted, 28 U.S.C. § 2107(c); *Alaska Limestone*, 799 F.2d at 1411. Thus, we cannot hear their appeal under the unique circumstances doctrine.

D. Dismissal of Stay

Plaintiffs also ask that we reconsider our order to stay the appeal, dismiss the stay as improvidently granted, and enter judgment on the appeal nunc pro tunc. Plaintiffs cite no legal authority – and we are aware of none – for the proposition that we may decide a pending case under precedent that the Supreme Court has overruled retroactively. Because *Eisenstein* means that Plaintiffs' notice of appeal is, *and always was*, untimely, we have always lacked jurisdiction to address the merits of their appeal. We therefore will not dismiss the stay.

E. Remand

Plaintiffs also ask us for a limited remand to the district court so that it may determine whether they are entitled to a nunc pro tunc extension under Rule 4(a)(5). Such a remand would be futile, because the district court would be prohibited from granting an extension in the absence of a timely motion. *Alaska Limestone*, 799 F.2d at 1411. No such motion was filed in this case, and it is now too late to file one. Moreover, Rule 4 "precludes us from remanding . . . on the theory that the untimely notice of appeal itself might be considered by the district judge as a motion for

extension of time." *Pettibone*, 666 F.2d at 335. Accordingly, we decline to remand the case.[4]

Conclusion

We sympathize with Plaintiffs, who complied with our precedent in filing their notice of appeal 51 days after the entry of judgment. Nevertheless, we conclude that we lack jurisdiction over Plaintiffs' late appeal and may not act under the Federal Rules of Appellate Procedure to enable Plaintiffs to appeal.

Appeal DISMISSED. The motion to dismiss, filed January 22, 2009, is DISMISSED as moot.

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[4] We need not and do not decide whether any other avenue for action by the district court remains open in this case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

and

PATRICIA HAIGHT, ex rel and In Defense of Animals; et al.,

Plaintiffs-Appellants,

v.

CATHOLIC HEALTHCARE WEST; et al.,

Defendants-Appellees.

No. 07-16857

D.C. No. CV-01-02253-FJM
District of Arizona, Phoenix

ORDER

(Filed Feb. 9, 2009)

Before: THOMPSON, BERZON and N.R. SMITH, Circuit Judges.

Appellees filed a Motion to Stay Submission of Appeal with this Court on January 23, 2009. Appellants have filed a timely response.

Appellees' Motion to Stay Submission of Appeal is granted. It is hereby ordered that all further proceedings in this case are stayed until the Supreme Court resolves *United States ex rel. Eisenstein v. New York*, No. 08-660 (2009). This case is removed from

the oral argument calendar in San Francisco, California on February 10, 2009.

IT IS SO ORDERED.

United States of America, ex rel. Patricia Haight and In Defense of Animals, Plaintiffs, vs. Catholic Healthcare West, et al., Defendants.

No. CV-01-2253-PHX-FJM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

2007 U.S. Dist. LEXIS 59665

August 14, 2007, Decided
August 14, 2007, Field

COUNSEL: For United States of America, Plaintiff: Alan E Kleinburd, Dodge Wells, Michael F Hertz, LEAD ATTORNEYS, US Dept of Justice, Washington, DC; Lon R Leavitt, US Attorneys Office, Phoenix, AZ.

For In Defense of Animals, Plaintiff: Karen L Lugosi, Karen L Lugosi PC, Phoenix, AZ.

For Patricia Haight, ex rel and In Defense of Animals, Plaintiff: Jeremy L Friedman, LEAD ATTORNEY, Jeremy L Friedman Attorney at Law, Oakland, CA; Karen L Lugosi, LEAD ATTORNEY, Karen L Lugosi PC, Phoenix, AZ.

For Catholic Healthcare West, Catholic Healthcare West Arizona, Michael Berens, Defendants: Brian J Pollock, Dale A Danneman, LEAD ATTORNEYS, Lewis & Roca LLP, Phoenix, AZ.

JUDGES: Frederick J. Martone, United States District Judge.

OPINION BY: Frederick J. Martone

OPINION

ORDER

The court has before it defendants' motion for summary judgment (doc. 182), plaintiffs' response (doc. 194), and defendants' reply (doc. 202); and plaintiffs' motion for partial summary judgment (doc. 185), defendants' response (doc. 198), and plaintiffs' reply (doc. 203).

Defendants also filed two motions to strike, one to strike expert opinions (doc. 200), the other to strike plaintiffs' consolidated statement of undisputed facts (doc. 205). Both of these motions are improper under Rule 12(f), Fed. R. Civ. P., which applies only to "pleadings" under Rule 7(a), Fed. R. Civ. P., and not to motions and other papers under Rule 7(b), Fed. R. Civ. P. Therefore, both motions to strike are denied (docs. 200, 205). Nevertheless, plaintiffs' document entitled "Consolidated Reply Statement of Undisputed Material Facts" (doc. 204) is not authorized by the federal or local rules, and accordingly we do not consider it.

Defendants also submitted a Rule 12(b)(1) motion to dismiss the animal welfare assurance claim (doc. 181). The claim is now moot based on the plaintiffs' concession that they "do not claim the Animal Welfare Assurance number itself is a false statement." Plaintiffs' Response at 10 (doc. 194). Accordingly, this motion is denied on grounds of mootness (doc. 181).

I

Plaintiffs brought this action under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), alleging that defendants made false statements in connection with a research grant application to the National Institutes of Health ("NIH"), which resulted in a grant award to defendants of over $ 700,000. We originally dismissed the action for lack of subject matter jurisdiction, concluding that plaintiffs' claims were based on publicly disclosed information, and that Plaintiffs were not the original source of the information. Specifically, we found that the NIH grant application, which was obtained pursuant to a Freedom of Information Act ("FOIA") request, was an "administrative report" that was barred by the public disclosure provision of the FCA. The Ninth Circuit reversed and remanded, holding that a response to an FOIA request is not necessarily a "report" or "investigation" by the government for purpose of the public disclosure bar. *United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147, 1156 (9th Cir. 2006). Instead, whether the jurisdictional bar applies is "determined by reference to the nature of that document itself." *Id.* The court concluded that the NIH grant application obtained in response to the FOIA request does not qualify as a publicly disclosed document, and therefore plaintiffs' action is not barred. The case is before us once again.

II

In October 1997, defendant Michael Berens, Ph.D., as principal investigator on behalf of defendants' research institutions, submitted a grant application to the NIH, entitled "Allogenic Glioma in Immune Competent Dogs" ("the October 1997 grant application"). Defendants sought federal funding in connection with Dr. Berens' project to develop a canine model to study glioma, a form of human brain cancer. In his research, Dr. Berens attempted to develop a method for implanting gliomas in the brains of beagles, by first injecting cancerous cells into the flanks of prenatal pups, and later transplanting resulting subcutaneous tumors from the live born pups into the brains of the same dogs. The theory was that by implanting the cancer cells from a different genetic source ("allogenic") at the right time of gestation, the developing immune system in the fetal pup will recognize the tissue as its own, and will therefore allow implanted cancer cells to thrive without the use of immuno-suppressants that would otherwise compromise the immune systems of the study dogs.

Plaintiff In Defense of Animals is a national animal advocacy organization devoted to protecting the rights of animals. Plaintiff Patricia Haight is the Southwest Regional Director of In Defense of Animals. Plaintiffs claim that defendants violated the False Claims Act, 31 U.S.C. § 3729(a), by knowingly making false statements in their October 1997 grant application in order to improperly obtain NIH funds.

The parties have now filed cross-motions for summary judgment.

III

The *qui tam* provisions of the False Claims Act permit private individuals to sue, on behalf of the United States, persons or entities who "knowingly make[ ] . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government." *Id.* A person "knowingly" submits a false claim if, with respect to information in the claim, the person "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." *Id.* at § 3729(b).

At a minimum, falsity under the FCA requires proof of an objective falsehood. An untrue statement is not sufficient by itself to warrant liability under the FCA; the Act "requires a showing of knowing fraud." *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996). "Expressions of opinion, scientific judgment, or statements as to conclusions about which reasonable minds may differ cannot be false." *United States ex rel. Roby v. Boeing Co.*, 100 F. Supp. 2d 619, 625 (S.D. Ohio) (*citing Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992)). Falsity under the Act "does not mean 'scientifically untrue'; it means 'a lie.'"

Wang, 975 F.2d at 1421. The Act is concerned about "ferreting out 'wrongdoing,' not scientific errors." *Id.*

IV

Plaintiffs claim that defendants knowingly made false statements in the October 1997 grant application in order to obtain NIH funds. Specifically, plaintiffs assert that Dr. Berens (1) inflated the success rate in his preliminary studies; (2) propagated a falsehood by presenting unattainable "specific aims"; (3) omitted material information on experimental failures and expected outcomes; and (4) misrepresented the nature of Dr. Geoffrey Pilkington's collaboration in the project. We now examine the specific alleged false statements.

A. Inflated Success Rate in Preliminary Studies

Plaintiffs contend that after repeated unsuccessful attempts to win federal funding for his project, Dr. Berens substantially revised his October 1997 grant application by deleting prior statements of potential difficulties and falsely inflating the claimed success rate of his preliminary studies. Plaintiffs assert that defendants made three false statements regarding the results of preliminary studies.

1.

In February 1997, Dr. Berens submitted a grant application in which he stated that "evidence of immune tolerance to the allogenic glioma cells is manifest by the presence of subcutaneous tumors in up to 60% of the pups (in one case)." Plaintiffs' Exhibit 11B at 37. Dr. Berens revised this statement in his October 1997 grant application to provide that "evidence of immune tolerance to the allogenic glioma cells is manifest by the presence of subcutaneous **tumors in up to 80% of the pups**." Grant Application at 38 (emphasis in original). Dr. Berens similarly stated that "4 of 5 pups in one litter developed tumors." *Id.* at 41. Plaintiffs claim that without any additional data to support the upgrade, Dr. Berens fraudulently increased the success rate from 60% to 80% in order to ensure the approval of his grant application.

Defendants counter that the research records confirm that four out of five pups (80%) born to dam Yental (pups identified as Y2, Y3, Y4, and Y5) developed tumors. DSOF PP 24, 31-34. Defendants claim that before submission of the February 1997 grant application, three of five pups (60%) from Yental's litter, Y2, Y4, and Y5, were observed to have tumors. Y3's tumor was first observed in May 1997, after submission of the February 1997 grant application. DSOF P 33. Defendants argue that this new information supports the claimed increase in the success rate from 60% to 80%.

Plaintiffs also challenge Dr. Berens' method of identifying subcutaneous tumors, namely palpation of subcutaneous masses at the site of the injection. Plaintiffs reject this method, instead interpreting Dr. Berens' research protocol as requiring histologic confirmation of "subcutaneous *glioma* tumors." Plaintiffs' Response at 3 (emphasis added). Plaintiffs' expert, Dr. Lawrence Hansen opined that "it is essential that suspected subcutaneous tumors are properly verified as glial" and that such tumors must be identified by a "histologic evaluation." *Id.*

The statements at issue in the October 1997 grant application specifically reported that "subcutaneous tumors" were found in "up to 80% of the pups," not "glioma tumors." There is no evidence to suggest that histologic confirmation is required to observe a "subcutaneous tumor." In fact, defendants' expert opined that "[m]ost of the research doesn't use histologic confirmation of tumors," and that palpation is a specific protocol accepted by the NIH. DSOF P 36. Plaintiffs' argument that Dr. Berens' research protocol required identification of subcutaneous glioma tumors amounts to criticism of the rationale underlying Dr. Berens' research protocol. But the False Claims Act protects against fraud. It is not a vehicle to vindicate contrary views.

Plaintiffs also argue that regardless of the method used to identify tumors, the evidence does not support the claim that four of Yental's five pups developed subcutaneous tumors. Plaintiffs' Response at 5. They claim that Y2's tumor does not count

because it resorbed; Y3's tumor does not count because it did not develop until a year after birth; Y4's tumor does not count because the slide confirming the 1996 histology of the tumor could not be found; and Y5's tumor does not count because it was found during an autopsy. Plaintiffs do not deny that tumors existed in these pups, but contend that the quality of the tumors was inadequate to reasonably support the statement that "4 of 5 pups in one litter developed tumors." As noted, expressions of scientific opinion or judgment about which reasonable minds may differ cannot be false. *See Wang*, 975 F.2d at 1420-21. Whether the quality of a particular tumor is sufficient to classify it as a "subcutaneous tumor" involves a scientific judgment or opinion and cannot serve as the basis for an FCA claim. *See United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (*citing Wang*, 975 F.2d at 1420-21) ("errors based simply on . . . flawed reasoning are not false under the FCA").

2.

Plaintiffs next claim that the defendants falsely stated in their October 1997 grant application that, "[m]ost recently, cells from one of the clones was used to induce immune tolerance in fetal dogs in four separate litters," Grant Application at 35, and that "[s]uccessful allo-tolerant pups from four separate litters have been achieved." Grant Application at 41. Defendants contend that these statements are true and that research records confirm that before

submission of the October 1997 grant application, dogs from four separate litters (from dams Yental, Tess, Winnie, and Maggie) had histologically confirmed subcutaneous gliomas after having been fetally implanted with cancer cells. DSOF PP 21-27.

Plaintiffs' expert, Dr. Hansen, confirmed that evidence showed subcutaneous gliomas in pups from four separate litters. DSOF, exhibit 10 at 55-56; DSOF PP 21-27. Now acknowledging that the evidence supports the existence of glioma tumors, Plaintiff's Response at 4, plaintiffs instead argue that the phrase "most recently" does not accurately describe tests conducted in September 1993, June 1994, and May 1995. We reject this argument. A vague, undefined phrase such as "most recently" is not an objective statement of fact upon which a false claims action can be based. *See Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067-68 (9th Cir. 2001) (holding that statements lacking "meaningful specificity" cannot support a fraud claim). These statements are not actionable under the False Claims Act.

3.

Plaintiffs also challenge defendants' statement that "[i]n the past two years, one in four litters yielded at least one pup with a tumor." Grant Application at 48. Defendants assert that from October 1995 through October 1997, the two years before submission of the October 1997 grant application, eighteen different dams underwent fetal implant surgery. Of

those eighteen dams, five gave birth to at least one dog that developed a subcutaneous tumor. DSOF PP 40-58. Therefore, according to defendants, the challenged statement is true.

While plaintiffs acknowledge that "lumps," "growths," or "tumors" were identified in these five litters, they argue that a particular growth was insufficient to support the statement that "one in four litters yielded at least one pup with a tumor." For example, plaintiffs challenge tumors that were discovered during autopsies, arguing that "if the pup cannot survive . . . it cannot be used as a study dog." Plaintiffs' Response to DSOF P 54 (doc. 195). This argument, however, does not refute the statement that a tumor was observed.

Plaintiffs also challenge defendants' identification of two pups (Z2 and Z3) born to dam Sassy as having developed lumps or growths shortly after birth. DSOF P 50. Although plaintiffs acknowledge that lumps or growths were observed initially, because the treatment notes stop referencing the growths, plaintiffs assert that an assumption must be made that these growths were not glioma tumors. Again, plaintiffs attempt to rewrite the grant application as expressing that one in four litters yielded at least one pup with a *glioma* tumor. This argument does not accurately characterize the statement at issue. Moreover, whether a growth that subsequently resorbs is appropriately considered a "tumor" for purposes of assessing the success rate of the preliminary studies is a matter of scientific judgment about

which reasonable minds may differ, and thus cannot be false for purposes of the FCA.

B. Unrealistic "Specific Aims"

Plaintiffs assert that defendants presented a false and fraudulent "factorial design" in their October 1997 grant application, by projecting that they would create approximately 78 cranial tumors in 108 pups following surgeries in 18 dogs over three years. *See* Grant Application at 54. plaintiffs argue that the falsity of this statement is evidenced by the fact that in the February 1997 grant application, Dr. Berens proposed to create only 20 study dogs with cranial tumors – a "miraculous four-fold increase" over the October 1997 application.[1] They contend that Dr. Berens' "factorial design" is unrealistic and unattainable given that defendants had only produced 2 dogs with cranial glioma implants after 37 surgeries over 7 years.

Defendants counter that the statement at issue is not a "factorial design" as described by plaintiffs. Instead, it is expressly identified as a "specific aim," Grant Application at 54, w[illegible]ch, according to the NIH, is a "broad, long-term objective" for the research.

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[1] We note, however, that in language virtually identical to the February application, the October 1997 application also provides that "[t]en dogs . . . will be followed for response to surgery and radiation. Ten dogs will be evaluated for response to surgery, radiation and chemotherapy." Grant Application at 52.

DSOF P 82. According to defendants, the challenged statement is an outcome which they aspired to achieve, not one they predicted they would achieve.

The grant application clearly identifies Dr. Berens' statement as a "specific aim," not a "projection." The statement of defendants' broad, long-term goals following completion of his project is not objectively verifiable, and therefore cannot form the basis of an FCA claim. *See Doe v. Howe Military Sch.*, 227 F.3d 981, 991 (7th Cir. 2000) (holding that school's stated "goals and objectives" are not the type of representations that would support a fraud claim).[2] Errors based simply on faulty calculations or flawed reasoning are not false under the FCA. *See Wang*, 975 F.2d at 1420-21.

C. Omission of Material Information

Plaintiffs next assert that defendants violated the FCA by removing statements in the February 1997 grant application that indicated persistent

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[2] Plaintiffs also challenge defendants' statement in the October 1997 grant application that "we have also achieved the technical and surgical skills necessary for realizing the desired outcome." Grant Application at 41. Plaintiffs construe the phrase "desired outcome" as equivalent to defendants' "specific aim" to create 78 cranial tumors. Plaintiffs do not challenge defendants' surgical or technical skills, but only whether the "desired outcome" can be achieved. We have already concluded that defendants' specific aim is not an objectively verifiable fact upon which a false claims action can be based.

experimental failures and low success rates. For example, plaintiffs claim that Dr. Berens deleted from the February 1997 grant application the statement that "[t]here is a possibility that allogenic tolerance is an infrequent event, and that despite the proposed experiments, only a low success rate will be achieved." Plaintiffs' Exhibit 11B at 44. Moreover, plaintiffs claim that defendants failed to report that they had only a 6% success rate for inducing allogenic tolerance to subcutaneous tumors and a 1.6% success rate for cranial implants.

The False Claims Act does not impose liability for omissions unless the defendant has an obligation to disclose the omitted information. *United States ex rel. Berge v. Bd. of Trustees*, 104 F.3d 1453, 1461 (4th Cir. 1997). Plaintiffs fail to show how defendants were required to disclose the omitted statements. Their absence did not render the statements that were made false or misleading. In fact, defendants' October 1997 grant application included statements of limited experimental success. For example, the October 1997 application provided that "[a]s disclosed in the prior application ' . . . the percentage of tumor takes . . . was 'very low,'" and the purpose of the grant was "the need to improve the success rate of the procedure." Grant Application at 28 (omissions in original). The application further acknowledged that "[o]ther litters so implanted have also failed to show even one tumor. We are brought to the recognition that the [major histocompatibility complex] may serve as an immunological boundary through which only selected MHC

geneotypes could induce tolerance." *Id.* at 41. Defendants' inclusion of these statements of limited success in the October 1997 grant application significantly undermines plaintiffs' argument that defendants knowingly defrauded the NIH by the omission of material information. Therefore, the omission of the statements at issue cannot form the basis of a false claim.

D. False Statement Regarding Dr. Pilkington's Role

Finally, plaintiffs claim that defendants falsely stated that Dr. Geoffrey Pilkington would provide control dogs for the study. Plaintiffs' Response at 10. In their October 1997 grant application, defendants state that they will acquire canine glioma cell lines from spontaneous tumors in control dogs, either identified from a local veterinary practice or "acquired through collaboration with Dr. Pilkington." Grant Application at 43. Plaintiffs narrowly interpret this statement as providing that Dr. Pilkington will supply control dogs, but in fact he had not agreed to do so. In any event, Dr. Pilkington did agree to collaborate on defendants' canine glioma project by supplying "early passage canine glioma cell cultures for analysis." Grant Application at 70 (letter from Dr. Pilkington to Dr. Berens). Plaintiffs' narrow construction of defendants' statement will not serve as the basis for a false claim. They have presented no evidence to establish that the challenged statement was false.

V

We conclude that plaintiffs have failed to produce sufficient evidence from which a reasonable jury could find that the challenged statements in the October 1997 grant application were objectively false and therefore actionable under the False Claims Act. *See Hagood*, 81 F.3d at 1477-78; *Wang*, 975 F.2d at 1420-21.

Therefore, **IT IS ORDERED GRANTING** defendants' motion for summary judgment (doc. 182) and **DENYING** plaintiffs' motion for partial summary judgment (doc. 185).

IT IS FURTHER ORDERED DENYING defendants' motion to strike expert opinions (doc. 200), and **DENYING** defendants' motion to strike consolidated reply statement of undisputed material facts (doc. 205).

IT IS FURTHER ORDERED DENYING defendants' Rule 12(b)(1) motion to dismiss the animal welfare assurance claim as moot (doc. 181).

The clerk shall enter final judgment.

DATED this 14<th> day of August, 2007.

Frederick J. Martone

United States District Judge